

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS WEHLAGE, on her behalf and on
behalf of others similarly situated,

Plaintiff,

v.

EMPRES HEALTHCARE INC., et al.,

Defendants.

No. 10-05839 CW

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS OR STRIKE
NEW PLAINTIFFS AND
DEFENDANTS (Doc. No.
55), GRANTING EMPRES
ENTITIES' MOTION ON
ALTER EGO LIABILITY
(Doc. No. 56),
GRANTING IN PART
EVERGREEN LAKEPORT'S
MOTION TO DISMISS
(Doc. No. 57) AND
DENYING AS MOOT
EMPRES ENTITIES'
MOTION TO DISMISS
BASED ON PERSONAL
JURISDICTION (Doc.
No. 54)

Pursuant to the Court's May 25, 2011 Order (Docket No. 46), Plaintiff has filed a First Amended Complaint (1AC) re-alleging her original three claims based on violation of California Health and Safety Code section 1430(b); violation of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq.; and violation of the California Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, et seq. In addition to adding allegations to remedy the deficiencies noted in the May 25, 2011 Order, Plaintiff has added two new Defendants and ten individuals as named Plaintiffs who reside at the individual skilled nursing facilities

1 defined in the May 25, 2011 Order as the Evergreen Entities. See
2 May 25, 2011 Order at 1-2.

3 Defendants¹ file three separate motions to dismiss under
4 Federal Rule of Civil Procedure 12(b)(6) for failure to state a
5 claim upon which relief can be granted. In the first motion
6 (Docket No. 55), the EmpRes and Evergreen Entities move to dismiss
7 or strike all claims asserted against the Evergreen Entities and
8 all references to the Evergreen Entities as parties in the action,
9 all claims asserted by the newly added plaintiffs and all
10 references to the two new "Facility Defendants" on the ground that
11 such allegations were not authorized by the Court's May 25, 2011
12 Order.

13 In the second motion (Docket No. 56), the EmpRes Entities move
14 to dismiss based on Plaintiff's failure to allege alter ego
15 liability. In the third motion (Docket No. 57), Evergreen Lakeport
16 moves to dismiss the three claims asserted against it and the
17 EmpRes Entities join in this motion. The EmpRes Entities have also
18 filed a motion to dismiss under Rule 12(b)(2) for lack of personal
19 jurisdiction (Docket No. 54). This motion will be moot if the
20 Court grants the EmpRes Entities' motion to dismiss under Rule
21 12(b)(6) for failure to allege alter ego liability. See KEMA, inc.

22
23 ¹Moving Defendants are EmpRes Healthcare, Inc.; EHC
24 Management, LLC; EHC Financial Services, LLC; and Evergreen
25 California Healthcare, LLC (collectively, EmpRes Entities) and
26 Evergreen Lakeport. The claims against Defendants Evergreen at
27 Arvin, LLC; Evergreen at Bakersfield, LLC; Evergreen at Heartwood
28 Avenue, LLC, erroneously sued as Evergreen at Heartwood, LLC;
Evergreen at Springs Road, LLC; Evergreen at Tracy, LLC; Evergreen
at Oroville, LLC; Evergreen at Petaluma, LLC; and Evergreen at
Gridley (SNF), LLC (collectively, Evergreen Entities) were
dismissed without leave to amend in the May 25, 2011 Order.

1 v. Koperwhats, 2010 WL 3464708, *8 (N.D. Cal.) (declining to
2 address Rule 12(b)(2) motion because all claims were dismissed
3 under Rule 12(b)(6)).²

4 Plaintiff has filed a consolidated opposition and Defendants
5 have filed a consolidated reply. The motions were taken under
6 submission and decided on the papers. Having considered all the
7 papers filed by the parties, the Court grants the first and second
8 motions to dismiss, and grants in part and denies in part the third
9 motion to dismiss. The fourth motion to dismiss based on lack of
10 personal jurisdiction is denied without prejudice as moot.

11 BACKGROUND

12 The factual background is provided in the May 25, 2011 Order.
13 In that order, the Court dismissed the section 1430(b) and the UCL
14 claims against the EmpRes and Evergreen Entities on the ground that
15 Plaintiff failed to plead a factual basis for her assertion that
16 Evergreen Lakeport, the licensee of the skilled nursing facility
17 (SNF) in which she resides, is the agent for the EmpRes or
18 Evergreen Entities, nor did her allegations support invocation of
19 the alter ego doctrine. The Court dismissed the claims against the
20 EmpRes Entities with leave to amend for Plaintiff to add alter ego
21 allegations and dismissed the claims against the Evergreen Entities
22 without leave to amend because Plaintiff did not have standing to
23 sue any entity except Evergreen Lakeport, where she resided.

24
25 ²In the May 25, 2011 Order, the Court denied without prejudice
26 the EmpRes Entities' Rule 12(b)(2) motion because the claims
27 against them were dismissed with leave to amend. The Court allowed
28 the EmpRes Entities to renew their Rule 12(b)(2) motion, if
Plaintiff brought claims against them in an amended pleading.

1 The Court dismissed the CLRA claim against the EmpRes and
2 Evergreen Entities because Plaintiff had not alleged that they had
3 deceived her in the sale of services to her or that she suffered
4 damages as a result. This claim against the EmpRes Entities was
5 dismissed with leave to amend, and against the Evergreen Entities
6 was dismissed with prejudice.

7 In regard to the claims against Evergreen Lakeport, the Court
8 ruled that equitable abstention was not warranted and that the
9 primary jurisdiction doctrine did not apply. The Court ruled that
10 Plaintiff had stated claims under section 1430(b) and the UCL for
11 unlawful business acts, but that she had failed to identify, with
12 the required specificity, the basis of her CLRA claim. Plaintiff
13 was granted leave to amend the CLRA claim only.

14 DISCUSSION

15 I. Motion to Dismiss or Strike New Plaintiffs and Defendants

16 Federal Rule of Civil Procedure 15(a)(1) provides:

17 A party may amend its pleading once as a matter of course
18 within:

19 (A) 21 days after serving it, or

20 (B) if the pleading is one to which a responsive pleading
21 is required, 21 days after service of a responsive
22 pleading or 21 days after service of a motion under Rule
23 12(b), (e), or (f), whichever is earlier.

24 In the May 25, 2011 Order, the Court granted Plaintiff leave
25 to amend her complaint and specified how she could do so.
26 Plaintiff was not granted leave to add new parties to her action.
27 Therefore, Plaintiff is attempting to amend her complaint without
28 leave of the Court.

Under Rule 15(a)(1), a party may amend its pleading once as a

1 matter of course. However, the time for doing so is limited to
2 twenty-one days after service of the complaint or service of a
3 motion to dismiss under Rule 12(b). Plaintiff filed her complaint
4 in 2010, and more than twenty-one days has passed since she served
5 it on Defendants. Defendants filed their first motions to dismiss
6 on February 18, 2011, giving Plaintiff until March 11, 2011 to file
7 an amended complaint as a matter of course. Plaintiff's 1AC was
8 filed on June 8, 2011, outside of this time period. Because the
9 time for Plaintiff to amend her complaint as a matter of course has
10 elapsed, if she wishes to amend her complaint, she must obtain the
11 opposing parties' written consent or leave of the Court. Fed. R.
12 Civ. Pro. 15(a)(2). Therefore, Defendants' motion to dismiss or
13 strike the claims by and against the new parties is granted.

14 Furthermore, any claims re-stated against the Evergreen Entities
15 are dismissed. However, the allegations referring to the Evergreen
16 Entities that support Plaintiff's claims against the remaining
17 Defendants are not stricken. If Plaintiff wishes to make
18 additional amendments to her 1AC, she must move for leave to amend.

19 II. EmpRes Entities' Motion Regarding Alter Ego Liability

20 In paragraphs 37(a)-(h), 38(a)-(g), 39(a)-(q), and 41-44 of
21 her 1AC, Plaintiff has added allegations addressing how the EmpRes
22 Entities are subject to liability through the doctrine of alter ego
23 liability. For instance, the allegations in paragraph 37 specify
24 that all Defendants share the same officers and directors and that
25 the equitable member of each of the Evergreen Entities is Evergreen
26 California Healthcare; the allegations in paragraph 38 claim that
27 the Evergreen Entities are undercapitalized and rely on the assets
28

1 and capital of the EmpRes Entities; and the allegations in
2 paragraph 39 specify how the EmpRes Entities exert substantial
3 control over the day-to-day operations of the Evergreen Entities,
4 including but not limited to decisions which directly affect each
5 entity's hours of direct nursing care per patient per day (NHPPD),
6 which is the subject of this action.

7 The EmpRes Entities argue that Washington alter ego law
8 applies to this case, but that under the alter ego law of either
9 Washington or California, Plaintiff's allegations are insufficient
10 to establish alter ego liability.³ Plaintiff responds that
11 California alter ego law applies, but that under either State's
12 law, she has sufficiently alleged alter ego liability.

13 A. Choice-of-law

14 1. Contract Choice-of-Law Provision

15 Plaintiff argues that California law applies because the
16 Admission Agreement between Plaintiff and Evergreen Lakeport
17 contains a choice-of-law provision stating: "This Agreement is
18 governed by and in accordance with the laws of the United States of
19 America and the state where this Facility is located."⁴ Evergreen
20 Lakeport is located in California. The parties to the Admission
21 Agreement are the individual resident, or that resident's

22
23 ³In the May 25, 2011 Order, the Court acknowledged that
24 Defendants are organized under Washington law, but because they did
25 not take the position that Washington law controls this case, the
Court applied California's alter ego law.

26 ⁴Plaintiff requests that the Court take judicial notice of the
27 Admission Agreement because she refers to it in ¶ 58 of her 1AC and
it forms the basis of her claims under the UCL and CLRA. The Court
28 grants the request.

1 authorized representative, and Evergreen Lakeport.⁵ It governs the
2 parties' mutual responsibilities during the resident's stay at
3 Evergreen Lakeport, such as Evergreen Lakeport's monthly fee, the
4 resident's financial responsibilities to pay the fee, financial and
5 insurance arrangements, the resident's consent for treatment, and
6 the resident's termination, transfer or discharge.

7 The parties agree the Court exercises diversity jurisdiction
8 over this action. "When a federal court sitting in diversity hears
9 state law claims, the conflicts laws of the forum state are used to
10 determine which state's substantive law applies." 389 Orange
11 Street Partners v. Arnold, 179 F.3d 656, 661 (9th Cir. 1999).
12 California law thus determines the effect of the contractual
13 choice-of-law provision. Under California law, there is a "strong
14 policy favoring enforcement of [choice-of-law] provisions."
15 Nedlloyd Lines B.V. v. Sup. Ct., 3 Cal. 4th 459, 464-65 (1992). To
16 determine whether a choice-of-law provision is enforceable,
17 California courts follow the Restatement (Second) of Conflict of
18 Laws § 187, which provides that a choice-of-law provision will be
19 enforced unless either,

20 (a) the chosen state has no substantial relationship to
21 the parties or the transaction and there is no other
reasonable basis for the parties choice, or

22 (b) application of the law of the chosen state would be
23 contrary to a fundamental policy of a state which has a
24 materially greater interest than the chosen state in the
determination of the particular issue and which, under

25 ⁵Plaintiff states that the Admission Agreement is the same for
26 all Evergreen Entities' facilities in California. However, because
27 the claims against the Evergreen Entities have been dismissed, the
only relevant agreement is the one between Plaintiff and Evergreen
Lakeport.

1 the rule of § 188, would be the state of the applicable
2 law in the absence of an effective choice of law by the
parties.

3 Restatement (Second) of Conflict of Laws § 187(2).

4 However, the contract containing the choice-of-law provision
5 must govern the claim that is alleged to arise from it. Nedlloyd,
6 3 Cal. 4th at 469; Schlumberger Logelco Inc. v. Morgan Equipment
7 Co., 1996 WL 251951, *2 (N.D. Cal.).

8 Defendants argue that, under Schlumberger, the choice-of-law
9 provision in the Admission Agreement does not apply. In
10 Schlumberger, the defendants contended that a choice-of-law
11 provision in a contract for work on an oil drilling project
12 determined the law on alter ego liability. Id. at *1-2. The court
13 found that the alter ego theory was not controlled by the choice-
14 of-law provision in the oil drilling contract because the alter ego
15 claim did not arise from or relate to the contract. Id. at *3
16 (citing Dassault Falcon Jet Corp. v. Oberflex, Inc., 909 F. Supp
17 345, 348-49 (M.D.N.C. 1995) (choice-of-law provision in contract
18 not applied to determine alter ego liability because that issue was
19 collateral to and not part of parties' negotiations or expectations
20 with respect to the contract); United Trade Assocs. Ltd. v Dickens
21 & Matson (USA) Ltd., Inc., 848 F. Supp. 751, 759 (E.D. Mich. 1994)
22 (same)).

23 Plaintiff responds that Washington Mutual Bank v. Sup. Ct., 24
24 Cal. 4th 906, 917 (2001), which held that contractual choice-of-law
25 provisions should be applied broadly, is controlling, and that
26 Schlumberger is not applicable because it preceded Washington
27 Mutual. In Washington Mutual, the California Supreme Court

1 explained that the advocate of a choice-of-law clause bears the
2 burden of establishing that its alleged claims fall within its
3 scope. Id. at 916; Estrella v. Freedom Fin. Network, LLC, 2010 WL
4 2231790, *4 (N.D. Cal.) (Washington Mutual requires a court to
5 conduct a choice-of-law analysis for each claim or issue). In
6 Estrella, the court found that a choice-of-law clause in a consumer
7 contract for debt relief applied to all of the asserted claims,
8 including claims under the CLRA and UCL. Estrella, 2010 WL
9 2231790, at *5.

10 Neither Washington Mutual nor Estrella addressed an alter ego
11 issue; they both determined whether the plaintiff's substantive
12 claims were governed by the contract in question. Here, there is
13 no disagreement that Plaintiff's three substantive claims against
14 Evergreen Lakeport are governed by the Admission Agreement. To
15 bring the EmpRes Entities under the auspices of the Admission
16 Agreement and its choice-of-law provision, Plaintiff argues that
17 "because all Defendants are closely related to the Facilities who
18 signed the agreement, the parties' choice-of-law provision applies
19 to all Defendants." Opp. at 5. This reasoning illustrates that
20 the alter ego issue is collateral to the Admission Agreement.

21 Therefore, the Court holds that the choice-of-law provision in
22 the Admission Agreement does not apply to the alter ego analysis.

23 2. Statutory Choice-of-Law Analysis

24 Where a statute dictates the choice-of-law, the court need
25 not apply a common law choice-of-law analysis. Barclays Discount
26 Bank Ltd. v. Levy, 743 F.2d 722, 725 (9th Cir. 1984).

27 Defendants argue that California Corporations Code
28

1 section 17450(a) dictates that Washington alter ego law applies
2 to the three EmpRes Entities that are limited liability companies
3 (LLCs): EHC Management, LLC; EHC Financial Services, LLC; and
4 Evergreen California Healthcare, LLC. Section 17450(a) provides:

5 the laws of the state or foreign country under which a
6 foreign limited liability company is organized shall
7 govern its organization and internal affairs and the
8 liability and authority of its managers and members.

9 Plaintiff argues that section 17450(a) codified only the
10 "internal affairs doctrine" for LLCs. Plaintiff cites Butler v.
11 Adoption Media, LLC, which held that section 17450(a) did not
12 apply to a choice-of-law issue regarding LLCs because it merely
13 codified the internal affairs doctrine, which governs matters
14 concerning the relationships among or between the LLC and its
15 officers, directors and shareholders and does not govern disputes
16 involving people or entities that are not part of the LLC. 2005
17 WL 2077484, *1 and n.1 (N.D. Cal.) (citing Edgar v. MITE Corp.,
18 457 U.S. 624, 645 (1982) (internal affairs doctrine recognizes
19 that only one state should have authority to regulate matters
20 peculiar to relationships among or between corporation and its
21 officers, directors, and shareholders; otherwise corporation
22 could be faced with conflicting demands)). Plaintiff also cites
23 Milliken & Co. v. Haima Gp. Corp., 2010 U.S. Dist. LEXIS 44835,
24 *9-12 (S.D. Fla.), report and recommendation adopted, 2010 U.S.
25 Dist. LEXIS 44775 (S.D. Fla.), in which the court held that a
26 statute similar to section 17450(a) was inapplicable to a choice-
27 of-law issue because the substantive question was external to the
28 corporate entity.

1 To support the proposition that alter ego liability is a
2 matter of a LLC's internal affairs, Defendants cite Rubbermaid,
3 Inc. v. Robert Bosch Tool Gp., Corp., 2010 U.S. Dist. LEXIS
4 100650, *15 (C.D. Ill.), which applied a law similar to section
5 17450(a) to hold that the alter ego law of the state of
6 incorporation applied to determine the liability of a Delaware
7 LLC to claims brought by a third party. Defendants also cite
8 Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d 130, 132 (2nd
9 Cir. 1993), which applied the alter ego law of the state of
10 incorporation to determine the liability of shareholders to a
11 third party. The court stated, "Because a corporation is a
12 creature of state law whose primary purpose is to insulate
13 shareholders from legal liability, the state of incorporation has
14 the greater interest in determining when and if that insulation
15 is to be stripped away." Id.

16 There is no definitive authority on this issue. Defendants'
17 authority is more persuasive. First, the statutory language,
18 that the state of incorporation governs the liability and
19 authority of the LLC's managers and members, points to the
20 application of Washington's alter ego liability law to the LLCs
21 constituting the EmpRes Entities. Second, even though alter ego
22 liability involves law suits brought by third parties, it
23 determines, based on the structure of the corporation, whether
24 the shareholders are liable in lieu of the LLC, which is an
25 internal affair. Therefore, Washington's law determines the
26 alter ego liability of the LLCs constituting the EmpRes Entities.

3. Government Interest Test

Because no statute governs the choice of law for the alter ego liability of corporations and because there is no effective choice-of-law contractual provision, California's governmental interests test determines which State's law applies to the alter ego liability of EmpRes Healthcare, Inc. Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 100 (2006); Washington Mutual, 24 Cal. 4th at 919-20. In Kearney, the California Supreme Court described the governmental interest test as follows:

First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state.

39 Cal. 4th at 107-08.

The parties agree, and the Court finds, that the alter ego liability laws of Washington and California are different. Thus, the first prong of the governmental interest test is satisfied.

Defendants argue that a true conflict does not exist because Washington has an interest in applying its alter ego law to business entities formed under its laws, whereas California has no interest in controlling the corporate governance, organization

1 and liability of foreign business entities. See Hurtado v. Sup.
2 Ct., 11 Cal. 3d 574, 580 (1974) ("When one of two states related
3 to a case has a legitimate interest in the application of its law
4 and policy and the other has none, there is no real problem;
5 clearly the law of the interested state should be applied.").
6 For support, Defendants cite CTS Corp. v. Dynamics Corp. of
7 Amer., 481 U.S. 69, 91 (1987), which stated that it is "an
8 accepted part of the business landscape in this country for
9 States to create corporations, to prescribe their powers, and to
10 define the rights that are acquired by purchasing their shares.
11 A state has an interest in promoting stable relationships among
12 parties involved in the corporations it charters . . ."

13 Defendants also argue that California Corporations Code section
14 17450(a) shows that California has expressly disclaimed an
15 interest in applying California alter ego law to foreign limited
16 liability companies and the same should apply to corporations.

17 Plaintiff, citing McCann v. Foster Wheeler LLC, 48 Cal. 4th
18 68, 95 (2010), argues that California has an interest in
19 affording its residents a remedy for an injury. McCann addressed
20 whether a California or Oklahoma statute would govern a
21 California plaintiff's suit for injury from contracting
22 mesothelioma while working in an oil refinery in Oklahoma. Id.
23 at 74. The plaintiff's action was barred in Oklahoma by its
24 statute of limitations whereas, in California, the suit was
25 timely. Id. In this context, the court made the statement cited
26 by Plaintiff, "California has a legitimate interest in having a
27 statutory provision that affords a remedy for or a benefit to an
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1 injured person or business applied when, as here, the injured
2 person or business is a California resident or business." Id. at
3 95.

4 The law in question here is the alter ego doctrine, not
5 whether Plaintiff has a substantive cause of action against a
6 proper defendant. As Defendants point out, they are not
7 challenging the application of California law to any of
8 Plaintiff's causes of actions. Therefore, California's interest
9 in affording its resident a remedy for an injury is not directly
10 at issue.

11 Plaintiff also argues that California has an interest in
12 applying its alter ego law in this situation because it has a
13 long tradition of affording alter ego recovery to injured
14 consumers and has specifically included this remedy in California
15 Corporations Code section 17101, which states, in part, "A member
16 of a limited liability company shall be subject to liability
17 under the common law governing alter ego liability." However,
18 the issue is not whether California has an alter ego liability
19 law applicable to its own LLCs. The question is whether it has
20 an interest in applying its law to business entities that are
21 formed in states other than California. Notably, section 17101
22 does not indicate that it applies to a "foreign limited liability
23 company," which is defined in California Corporations Code
24 section 17001(q) as "(1) an entity formed under the limited
25 liability company laws of any state other than this state,
26 . . ." California does have an interest in preventing corporate
27 entities from escaping liability with an unwarranted corporate
28

1 shield; however, the application of Washington's alter ego
2 liability law would mitigate this concern.

3 In sum, Washington has a strong interest in controlling the
4 liability of business entities formed under its laws, and
5 California has an interest in preventing companies from escaping
6 liability through an unwarranted corporate shield. However,
7 California's interest is mitigated through the application of
8 Washington's alter ego law. Thus, the Court concludes that there
9 is no real conflict and Washington's alter ego law must be
10 applied.

11 B. Application of Washington Alter Ego Law

12 Washington's alter ego law consists of the following two-
13 part test: "First, the corporate form must be intentionally used
14 to violate or evade a duty; second, disregard must be necessary
15 and required to prevent unjustified loss to the injured party."
16 Meisel v. M & N Modern Hydraulic Press Co., 97 Wash. 2d 403, 410
17 (1982). The first prong requires abuse of the corporate form
18 that typically involves fraud, misrepresentation, or some form of
19 manipulation of the corporation to the stockholder's benefit and
20 creditor's detriment. Id. This can be seen as a judicial
21 expansion of the fraudulent conveyance law to circumstances in
22 which that doctrine does not apply. Id. The second prong
23 requires that wrongful corporate activities must actually harm
24 the party seeking relief; intentional misconduct must be the
25 cause of the harm that is avoided by disregard of the corporate
26 form. Id. Deliberate undercapitalization of a corporate entity
27 is insufficient to establish an abuse of the corporate form.

1 Norhawk Investments, Inc. v. Subway Sandwich Shops, Inc., 61
2 Wash. App. 395, 399-400 (1991).

3 Citing five paragraphs in her 1AC, Plaintiff argues that her
4 allegations satisfy Washington's alter ego test. In paragraph
5 42, Plaintiff alleges that the EmpRes Entities "deliberately set
6 up empty shells and agents so that [they] could deceive the
7 public and residents . . ." In paragraph 43, Plaintiff alleges
8 that "Defendants have created a maze of multiple undercapitalized
9 entities--which in reality operate as a single entity--in order
10 to avoid liability." In paragraph 40, Plaintiff alleges that
11 for-profit nursing home corporations such as EmpRes divide into
12 many separate shell companies "in order to avoid being held
13 accountable to both the public regulatory system and residents."
14 Plaintiff alleges that the EmpRes Entities fund, obtain licenses
15 for and guarantee the debt of Evergreen Lakeport and the other
16 Evergreen Entities. She also alleges that the EmpRes Entities
17 control all the factors that impact Evergreen Lakeport's and the
18 other Evergreen Entities' staffing levels, which is at issue in
19 this case.

20 The analysis in Norhawk is instructive for the determination
21 of whether Plaintiff states alter ego liability under Washington
22 law. In Norhawk, a franchisee abandoned its lease and the lessor
23 obtained a judgment against it. Norhawk, 61 Wash. App. at 397-
24 98. After the lessor failed to obtain payment from the
25 franchisee, it sued the franchiser under the theory of alter ego
26 liability. Id. at 398. The lessor argued that it was harmed by
27 the franchiser's corporate structure because, at all times, the

1 franchiser would be judgment proof. Id. The court stated,

2 Although Norhawk may have been harmed, harm alone does
3 not create corporate misconduct. "The absence of an
4 adequate remedy alone does not establish corporate
5 misconduct." . . . It is also well established that
6 "the purpose of a corporation is to limit liability."

7 Id. at 400 (citations omitted). The court explained that the
8 corporate form must be honored unless there is such "a
9 commingling of rights and interests as to render it apparent that
10 the entities are intended to function as one, and further, that
11 to regard them as separate would aid the consummation of a fraud
12 or wrong upon others." Id. at 401 (citations omitted).

13 Plaintiff's allegations that the EmpRes Entities have
14 financial and operational authority over Evergreen Lakeport and
15 the other Evergreen Entities are not sufficient to satisfy
16 Washington's alter ego test. First, except for conclusory
17 statements, Plaintiff fails to allege that the EmpRes Entities
18 intentionally abused the corporate form in order to engage in
19 fraud or misrepresentation. And, even if her allegations met the
20 first prong of the test, she fails to allege that the EmpRes
21 Entities intentionally harmed her by abusing the corporate form.
22 Plaintiff may bring her three claims against Evergreen Lakeport,
23 the residence where she lives and where she suffered the alleged
24 injury caused by its inadequate staffing. Although Plaintiff
25 alleges that Evergreen Lakeport is undercapitalized, she does not
26 allege that it was so created with the intention to harm her
27 through inadequate staffing or of avoiding paying her damages
28 caused by the inadequate staffing.

 Because Plaintiff has failed sufficiently to allege alter

1 ego liability, the EmpRes Entities' motion to dismiss the claims
2 against them is granted. Dismissal is without prejudice to
3 moving to add the Empress Entities, even after judgment, if
4 Evergreen Lakeport evades its responsibility to provide relief.
5 If Plaintiff brings such a motion, she may submit it with
6 evidence in support of her alter ego claim.

7 III. Evergreen Lakeport's Motion to Dismiss

8 Evergreen Lakeport argues that Plaintiff's CLRA claim and
9 UCL claim based on fraud should be dismissed for lack of
10 specificity under Rule 9 of the Federal Rules of Civil Procedure.
11 Evergreen Lakeport also argues that the Court should revisit its
12 decision regarding Plaintiff's claim under Health and Safety Code
13 section 1430(b), which provides a right of action for violations
14 of the minimum staffing requirements set forth in Health and
15 Safety Code section 1265.5(a), and the doctrines of equitable
16 abstention and primary jurisdiction.

17 A. CLRA Claim

18 As stated in the May 25, 2011 Order, the CLRA prohibits
19 "deceptive acts or practices undertaken by any person in a
20 transaction intended to result or which results in the sale or
21 lease of goods or services to any consumer." Cal. Civ. Code
22 § 1770(a). Because the claim sounds in fraud, it is subject to
23 the heightened pleading requirements of Federal Rule of Civil
24 Procedure 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-26
25 (9th Cir. 2009). The allegations must be "specific enough to
26 give defendants notice of the particular misconduct which is
27 alleged to constitute the fraud charged so that they can defend

1 against the charge and not just deny that they have done anything
2 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
3 Statements of the time, place and nature of the alleged
4 fraudulent activities are sufficient, id. at 735, provided the
5 plaintiff sets forth "what is false or misleading about a
6 statement, and why it is false." In re GlenFed, Inc., Secs.
7 Litig., 42 F.3d 1541, 1548 (9th Cir. 1994). Allegations of fraud
8 based on information and belief usually do not satisfy the
9 particularity requirements of Rule 9(b); however, as to matters
10 peculiarly within the opposing party's knowledge, allegations
11 based on information and belief may satisfy Rule 9(b) if they
12 also state the facts upon which the belief is founded. Wool v.
13 Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987).

14 Evergreen Lakeport asserts that Plaintiff fails to plead the
15 substance and nature of the alleged misrepresentations made to
16 her with the required specificity. Plaintiff responds that, in
17 ¶¶ 93, and 95 through 103, of the 1AC, she adequately pleads
18 Evergreen Lakeport's failure to disclose the material fact that
19 it was understaffed. Citing Falk v. General Motors Corp., 496 F.
20 Supp. 2d 1088, 1095 (N.D. Cal. 2007), Plaintiff also argues that,
21 when a CLRA claim is based on non-disclosure or active
22 concealment of a material fact, there is no need to plead
23 specific misrepresentations. In Falk, the court stated that a
24 CLRA claim based on failure to disclose is cognizable where:
25 (1) the defendant had exclusive knowledge of material facts not
26 known to the plaintiff and (2) the defendant actively concealed a
27 material fact from the plaintiff. Id. To show that the non-

1 disclosed information is material, a plaintiff must show that
2 "had the omitted information been disclosed, a reasonable
3 consumer would have been aware of it and behaved differently."

4 Id.

5 In her 1AC, Plaintiff alleges that Defendants "did not
6 disclose and actively concealed that the [Evergreen Entities]
7 have failed to comply with California's minimum and adequate
8 nurse staffing requirements as alleged herein, and continue to do
9 so", 1AC at ¶ 93, and that Defendants knew they had inadequate
10 staffing and Plaintiff did not know it, 1AC at ¶¶ 96-97.

11 Paragraph 98 is the heart of the claim, alleging Defendants'
12 fraudulent conduct as: (1) representing to state regulators that
13 they were complying with the nursing staff requirements;
14 (2) representing to the consuming public, including Plaintiff,
15 that the Evergreen Entities were in compliance with the required
16 staffing levels; (3) failing to disclose to residents or
17 prospective residents that the Evergreen Entities fell below the
18 nurse staffing requirement; (4) responding to the regulators'
19 deficiency notices by promising to improve staffing, but failing
20 to do so; (5) responding to regulators' deficiency notices by
21 posting projected, as opposed to actual, staffing ratios; and
22 (6) responding to residents' complaints with misleading
23 assertions that staffing shortfalls were isolated incidents or
24 that they would be addressed.

25 Plaintiff is correct that she does not have to plead
26 specific misrepresentations when the issue is concealment or non-
27 disclosure. However, five of the six allegations in ¶ 98 are

1 that Defendants made misrepresentations. Only ¶ 98(3) alleges
2 failure to disclose a material fact and this allegation is
3 sufficient to state a claim. The other allegations in
4 ¶ 98 are deficient under Rule 9(b) because they do not state who
5 made the statement, the time and place of the statement and how
6 the statement was made to Plaintiff.

7 Evergreen Lakeport next argues that the allegations are
8 insufficient because they do not indicate that Plaintiff had or
9 could have had any exposure to any representation, or that there
10 were any circumstances in which Evergreen Lakeport should have or
11 could have provided other information to her, or that she relied
12 on these misrepresentations or non-disclosures to her detriment.
13 However, in ¶ 100, Plaintiff alleges reliance by stating that the
14 non-disclosed fact was material and, had she known it, she would
15 not have agreed to reside at Evergreen Lakeport. Also, in ¶ 101,
16 Plaintiff alleges that she could not reasonably have been
17 expected to learn or discover by herself the non-disclosed facts
18 regarding staffing violations. This is sufficient to state
19 reliance for the non-disclosure allegation.

20 Citing Swartz v. KPMG LLP, 476 F.3d 756, 764-64 (9th Cir.
21 2007), Evergreen Lakeport also argues that the allegations are
22 insufficient because they refer to Defendants, in general,
23 without specifying the part each Defendant played in the
24 concealment or non-disclosures. In Swartz, the court stated:
25 "Rule 9(b) does not allow a complaint to merely lump multiple
26 defendants together but 'requires plaintiffs to differentiate
27 their allegations when suing more than one defendant . . . and

1 inform each defendant separately of the allegations surrounding
2 his alleged participation in the fraudulent scheme.' . . . In the
3 context of a fraud suit involving multiple defendants, a
4 plaintiff must, at a minimum, 'identify the role of each
5 defendant in the alleged fraudulent scheme.'" Id. at 765 (citing
6 Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th
7 Cir. 1989)).

8 None of Plaintiff's allegations discloses the role of any
9 specific Defendant in the misrepresentations or intentional non-
10 disclosure or concealment of the nursing staff violations.
11 Plaintiff may amend to allege, if she truthfully can do so, that
12 Evergreen Lakeport made the misrepresentations to Plaintiff, or
13 failed to disclose material facts.

14 The CLRA claim is dismissed with leave to amend only to
15 remedy the deficiencies noted above.

16 B. UCL Claim Based On Fraud

17 Evergreen Lakeport moves to dismiss the fraud-based
18 allegations in the UCL claim on the ground that they too fail to
19 meet Rule 9(b)'s requirement for specificity.

20 The UCL prohibits "any unlawful, unfair or fraudulent
21 business act or practice and unfair, deceptive, untrue or
22 misleading advertising." Under the UCL, "a fraudulent business
23 practice is one in which members of the public are likely to be
24 deceived." Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App.
25 4th 1235, 1254 (2009). UCL claims grounded in fraud must satisfy
26 Rule 9(b). Kearns, 567 F.3d at 1125.

27 Paragraph 86 of the 1AC alleges: "Defendants, and each of
28

1 them, have also engaged in fraudulent business practices by
2 virtue of their failure to disclose and active concealment of the
3 actual levels of nurse staffing at their California skilled
4 nursing facilities." Paragraph 87 alleges: "Members of the
5 general public (including . . . persons admitted to and/or
6 residing in the Facilities during the Class Period . . .) have
7 been and are likely to be deceived by the statements,
8 representations, omissions, and other conduct by Defendants as
9 alleged herein."

10 These allegations are sufficient to state that Plaintiff, as
11 a person admitted to one of the Facilities, was not told the
12 material facts about nurse staffing violations and that she and
13 members of the public were likely to be deceived by the
14 concealment. However, these allegations suffer from the same
15 deficiency noted above in that they do not specify the role that
16 Evergreen Lakeport played in the misrepresentations or
17 concealment. As stated above, Plaintiff may amend to allege, if
18 she truthfully can do so, who made the misrepresentations to
19 Plaintiff, and failed to disclose material facts. This claim is
20 dismissed with leave to amend only to remedy the deficiencies
21 noted above.

22 C. Renewed Arguments Regarding § 1430(b) Claim, Abstention
23 and Primary Jurisdiction

24 In the May 25, 2011 Order, the Court denied Evergreen
25 Lakeport's motion to dismiss Plaintiff's UCL claim for unlawful
26 business acts, based on equitable abstention, denied the motion
27 to stay the case pursuant to the doctrine of primary
28

1 jurisdiction, and denied the motion to dismiss the California
2 Health and Safety Code section 1430(b) claim on the merits. In
3 regard to the doctrine of equitable abstention, the Court stated
4 that dismissal was without prejudice to renewal if circumstances
5 changed. See May 25, 2011 Order at 16. Based on this statement,
6 Evergreen Lakeport seeks to renew all the arguments presented in
7 its first motion to dismiss.

8 Evergreen Lakeport's attempts to re-litigate the primary
9 jurisdiction doctrine and the merits of the § 1430(b) claim are,
10 in effect, motions for reconsideration, which are not properly
11 before the Court. See Civil L.R. 7-9. Therefore, its motion to
12 dismiss based on these arguments is denied.

13 Evergreen Lakeport argues that re-visiting equitable
14 abstention is warranted because, since the Court issued the May
15 25, 2011 Order, two other courts have applied this doctrine to
16 dismiss claims identical to those asserted by Plaintiff. The two
17 cases are Walsh v. Kindred Healthcare, __ F. Supp. 2d __, 2011 WL
18 2415739 (N.D. Cal. June 15, 2011) (J. White) and Shuts v.
19 Covenant Holdco, LLC, Case No. RG10551807 (Alameda County Sup.
20 Ct. May 4, 2011).⁶

21 Neither Walsh nor Shuts is binding authority and neither
22 persuades the Court that it should reconsider its decision.
23 Therefore, Evergreen Lakeport's renewed motion to dismiss the UCL
24 claim for unlawful business acts, based on equitable abstention,
25 is denied.

26
27 ⁶The Shuts case was decided before the Court issued the May
28 25, 2011 Order.

CONCLUSION


For the foregoing reasons, the Court: (1) grants Defendants' motion to dismiss or strike the claims brought by or against new parties in the 1AC; (2) grants the EmpRes Entities' motion to dismiss based on lack of alter ego liability; (3) grants in part and denies in part Evergreen Lakeport's motion to dismiss as follows: (a) the CLRA claim is dismissed with leave to amend; (b) the UCL fraud claim is dismissed with leave to amend; (c) the motion is otherwise denied; and (4) denies without prejudice the EmpRes Entities' motion to dismiss for lack of personal jurisdiction as moot, with leave to refile if the alter ego issue is revisited at a later date. Plaintiff's motion to compel jurisdictional discovery (Docket No. 69) is denied without prejudice to refiling if the Empres Entities refile their jurisdictional motion. Plaintiff's motion for an extension of time for briefing on the jurisdictional motion is also denied (Docket No. 73).

If Plaintiff wishes to amend her complaint to add parties and claims, she must file a motion seeking leave to amend within seven days from the date of this order. If she does so, she shall include in her proposed amended complaint the amendments allowed in this order. If she does not move for leave to amend, she must file an amended complaint as allowed by this order within seven days. Defendants may file an answer, or a combined motion to dismiss the amended complaint and opposition to the motion for leave to amend, of no more than twenty-five pages, within fourteen days from the date the motion and/or the amended

1 complaint are filed. Within seven days thereafter, Plaintiff may
2 file a combined reply of no more than fifteen pages. The motions
3 will be taken under submission. If leave to amend is granted,
4 Plaintiff will have to serve personally the two new Defendants,
5 if she has not yet done so. The Court will schedule a case
6 management conference after issuing its order.

7
8 IT IS SO ORDERED.

9
10 Dated: 10/31/2011



CLAUDIA WILKEN
United States District Judge